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Nos. 95-1523, 95-1883, 95-8995, 95-9041 and 95-9081

In the Supreme Court of the United States

OCTOBER TERM, 1995

MICHAEL M. SKOTT, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN R. STAMBAUGH, PETITIONER

v.

UNITED STATES OF AMERICA

JAMES A. KETCHUM, PETITIONER

v.

UNITED STATES OF AMERICA

GEORGE WILSON, PETITIONER

v.

UNITED STATES OF AMERICA

DANIEL J. BALINT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
DEVAL L. PATRICK
Assistant Attorney General
JESSICA DUNSAY SILVER
GREGORY B. FRIEL
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTION PRESENTED

Whether Congress lacked authority under the Commerce Clause to enact the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. 248.

TABLE OF CONTENTS

	Page
Opinions below	2
Jurisdiction	2
Statement:	
1. Statutory background	2
2. Factual background	5
Argument	8
Conclusion	16

TABLE OF AUTHORITIES

Cases:

American Life League, Inc. v. *Reno*, 47 F.3d 642 (4th Cir.), cert. denied, 116 S. Ct. 55 (1995)	7, 8, 9
Bray v. *Alexandria Women's Health Clinic*, 506 U.S. 263 (1993)	15, 16
Cheffer v. *Reno*, 55 F.3d 1517 (11th Cir. 1995)	8
Cook v. *Reno*, 859 F. Supp. 1008 (W.D. La. 1994)	9
Council for Life Coalition v. *Reno*, 856 F. Supp. 1422 (S.D. Cal. 1994)	9
Fry v. *United States*, 421 U.S. 542 (1975)	16
Hodel v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981)	14, 15
Hoffman v. *Hunt*, No. 3:93-CV-393 P, 1996 WL 192934 (W.D.N.C. Apr. 17, 1996), appeal pending, Nos. 96-1581 & 96-1582 (4th Cir.)	9
Katzenbach v. *McClung*, 379 U.S. 294 (1964)	12
National Org. for Women (NOW) v. *Operation Rescue*, 726 F. Supp. 1483 (E.D. Va. 1989), aff'd, 914 F.2d 582 (4th Cir. 1990), rev'd in part on other grounds, vacated in part *sub nom. Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263 (1993)	3, 4
Perez v. *United States*, 402 U.S. 146 (1971)	10
Preseault v. *ICC*, 494 U.S. 1 (1990)	14
Riely v. *Reno*, 860 F. Supp. 693 (D. Ariz. 1994)	9

Cases–continued: Page

Summit Health, Ltd. v. *Pinhas*, 500 U.S. 322 (1991) 10
United States v. *Bird*, Crim. No. H-95-71 (S.D. Tex. June 6, 1995), appeal pending, No. 95-20792 (5th Cir.) 9
United States v. *Dinwiddie*, 76 F.3d 913 (8th Cir. 1996) 8
United States v. *Lopez*, 115 S. Ct. 1624 (1995) 6, 7, 8, 9, 10, 12, 13, 14, 15
United States v. *Lucero*, 895 F. Supp. 1421 (D. Kan 1995) 9
United States v. *McMillan*, C.A. No. 3:95-cv-633WS (S.D. Miss. Nov. 24, 1995) 9
United States v. *Robertson*, 115 S. Ct. 1732 (1995) .. 15, 16
United States v. *Scott*, 919 F. Supp. 76 (D. Conn. 1996) 9
United States v. *Soderna*, 82 F.3d 1370 (7th Cir. 1996) 9
United States v. *White*, 893 F. Supp. 1423 (C.D. Cal 1995) 9
Wickard v. *Fillburn*, 317 U.S. 111 (1942) 10

Statutes and regulations:

U.S. Const.:
Amend. XIV 6, 8
§ 5 ..... 6, 8, 10
Art. I, § 8, Cl. 3 (Commerce Clause) .. 6, 7, 8, 9, 10, 15, 16
Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, § 2, 108 Stat. 694, 18 U.S.C. 248 *et seq.* 2, 13
18 U.S.C. 248(a) 5
18 U.S.C. 248(a)(1) 6, 13
18 U.S.C. 248(e)(4) 5, 13
18 U.S.C. 248(e)(5) 13

Miscellaneous: Page

H.R. Conf. Rep. No. 488, 103 Cong., 2d Sess (1994) ... 3, 4, 11-12
H.R. Rep. No. 306, 103d Cong., 1st Sess. (1993) ... 2, 3, 4, 11
S. Rep. No. 117, 103d Cong., 1st Sess. (1993) .. 2, 3, 4, 11, 13

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (95-1523 Pet. App. 1-65) is reported at 73 F.3d 675. The district court's opinion (95-1523 Pet. App. 66-101) is reported at 880 F. Supp. 621.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1995. 95-1523 Pet. App. 1. Petitions for rehearing were denied on February 21, 1996. 95-1523 Pet. App. 102-103. Petitioner Skott filed a petition for a writ of certiorari on March 20, 1996. Petitioner Ketchum filed a petition for a writ of certiorari on May 16, 1996. Petitioners Stambaugh and Wilson filed petitions for a writ of certiorari on May 20, 1996. Petitioner Balint filed a petition for a writ of certiorari on May 21, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. *Statutory Background*

Congress enacted the Freedom of Access to Clinic Entrances Act of 1994 (Access Act), Pub. L. No. 103-259, § 2, 108 Stat. 694, 18 U.S.C. 248, in response to a nationwide campaign of violent and obstructive interference with access to reproductive health services. S. Rep. No. 117, 103d Cong., 1st Sess. 3 (1993) (S. Rep.). From 1977 through April, 1993, more than 1,000 acts of violence against providers of abortion services were reported in the United States. *Ibid.*; H.R. Rep. No. 306, 103d Cong., 1st Sess. 6 (1993) (H.R. Rep.). Those acts included at least 36 bombings, 81 arsons, 131 death threats, 84 assaults, two kidnappings, 327 clinic invasions, 71 chemical attacks, and

one murder. S. Rep. 3, 6; H.R. Rep. 6-7; H.R. Conf. Rep. No. 488, 103d Cong., 2d Sess. 7 (1994) (H.R. Conf. Rep.). This violence endangered the lives of and inflicted injuries on physicians, clinic staff and patients, caused millions of dollars of property damage, and curtailed access to health care for many women, particularly poor women who live in rural areas. S. Rep. 5.

Groups opposed to abortion organized blockades designed to bar access to health care facilities where abortions were performed and to overwhelm local law enforcement. S. Rep. 7; H.R. Rep. 7. From 1977 through April, 1993, more than 6,000 clinic blockades and related disruptions were reported in the United States. S. Rep. 7; H.R. Rep. 7; see also *National Org. for Women (NOW)* v. *Operation Rescue*, 726 F. Supp. 1483, 1489-1490 (E.D. Va. 1989), aff'd, 914 F.2d 582 (4th Cir. 1990), rev'd in part on other grounds, vacated in part *sub nom. Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263 (1993). Providers of abortions also received numerous death threats. S. Rep. 10.

Violence aimed at abortion providers and facilities —including shootings, bombings, arson, death threats, chemical attacks, and clinic blockades—has occurred in at least 28 States, the District of Columbia, and dozens of cities across the country. S. Rep. 12. Many of these activities have been organized nationwide and directed across state lines. *Id.* at 13; H.R. Rep. 9. In addition, clinics and other providers of reproductive health services are involved in interstate commerce, both directly and indirectly. S. Rep. 31. Many patients who seek abortion services travel across state lines to obtain services, and clinic employees sometimes travel across state lines to work. *Ibid.*

The declared purpose and effect of the violent and obstructive activities have been to inhibit women's access to safe and legal abortion services. S. Rep. 11 & n.22; *NOW* v. *Operation Rescue*, 726 F. Supp. at 1488. In some cases, the purpose was to eliminate access by intimidating physicians from performing abortions and closing clinics. S. Rep. 11, 17. The evidence before Congress demonstrated that the campaign to eliminate abortion services through violence and obstruction was succeeding, and had forced many clinics to close. *Id.* at 14, 17, 31; H.R. Rep. 8-9.

Congress found that the violent and obstructive conduct burdens interstate commerce by

> interfering with the interstate commercial activities of health care providers, including the purchase and lease of facilities and equipment, sale of goods and services, employment of personnel and generation of income, and purchase of medicine, medical supplies, surgical instruments and other supplies from other states.

H.R. Conf. Rep. 7. See also S. Rep. 14, 17, 31-32. Congress also found that federal, state, and local laws in effect prior to the enactment of the Access Act were inadequate to prevent violence at abortion facilities. *Id.* at 19-21; H.R. Rep. 6, 10.

The Act provides civil and criminal penalties for anyone who:

> (1) by force or threat of force or by physical obstruction,[1] intentionally injures, intimidates

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[1] The Access Act defines "physical obstruction," in relevant part, as "rendering impassable ingress to or egress from a facility that provides reproductive health services * * * or

> or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services; [or]
>
> * * * * *
>
> (3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services * * *.

18 U.S.C. 248(a).

2. *Factual Background*

a. In the early morning hours of September 29, 1994, petitioners and another co-defendant blockaded the entrances of the Wisconsin Women's Health Care Center, a reproductive health services facility located in Milwaukee, Wisconsin. 95-1523 Pet. App. 2. Defendants used two automobiles to blockade the facility. One car was wedged into the front entrance of the building, barring the doors and preventing ingress to or egress from the clinic. The second car was pressed against the clinic's rear door, also preventing ingress and egress. *Ibid.* Defendants welded, bound and handcuffed themselves to the two vehicles in a variety of positions, including steel harnesses around the heads of two of the defendants, which they attached to the automobiles, thereby impeding the removal of the cars. *Id.* at 2-3. It took firefighters nearly four and a

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rendering passage to or from such a facility * * * unreasonably difficult or hazardous." 18 U.S.C. 248(e)(4).

half hours to extricate the six defendants safely from the automobiles, using various tools including hydraulic equipment and blow torches, and to remove the vehicles from the clinic entrances. *Id.* at 3. During that time, no clinic staff or patients could enter the building. The blockade prevented 12 patients from receiving scheduled abortions. *Ibid.*

The following day, the United States charged petitioners and another defendant with using physical obstruction to intentionally intimidate and interfere with persons because the persons were seeking to obtain or to provide reproductive health services, in violation of the Access Act, 18 U.S.C. 248(a)(1). 95-1523 Pet. App. 3. Defendants moved to dismiss the charges, in part based on the argument that Congress lacked authority to enact the Access Act. The district court granted the motion, holding that Section 248(a)(1) of the Act is unconstitutional because Congress was not authorized by either the Commerce Clause or Section 5 of the Fourteenth Amendment to enact the statutory prohibition against "non-violent physical obstruction of entrances to reproductive health services clinics." 95-1523 Pet. App. 66-67.

b. The court of appeals reversed. Applying this Court's decision in *United States* v. *Lopez*, 115 S. Ct. 1624 (1995), the court concluded that Congress had authority under the Commerce Clause to enact the Access Act because the statute regulates activity that substantially affects interstate commerce. 95-1523 Pet. App. 8-24. The court recognized that Congress made several specific findings about the effect of the prohibited conduct on interstate commerce, including: (1) "that reproductive health facilities operate within the stream of interstate commerce and that the activities proscribed by the Act bring the

commerce of a targeted facility to a halt," *id.* at 10-11; (2) that individuals travel interstate to obtain and to provide reproductive health services, *id.* at 12-14; and (3) that obstruction of reproductive health facilities decreases the overall availability of such health services nationwide, *id.* at 14-15. The court held that these findings provided a "plainly rational" basis for Congress to conclude that the regulated activity had a substantial effect on interstate commerce. *Id.* at 10, 18, 31. The court of appeals also held that the means chosen by Congress are reasonably adapted to the Act's permissible ends—including protecting the free flow of goods and services in commerce, protecting patients in their use of lawful services of reproductive health facilities, protecting women when they exercise their constitutional right to choose an abortion, protecting the safety of reproductive health care providers, and protecting reproductive health care facilities from physical destruction and damage. *Id.* at 10 n.6, citing *American Life League, Inc.* v. *Reno*, 47 F.3d 642, 647 (4th Cir.), cert. denied, 116 S. Ct. 55 (1995).

The court of appeals did not reach the government's contention that the Access Act also passes muster under the Commerce Clause because it regulates and protects "persons or things in interstate commerce." 95-1523 Pet. App. 24-31, citing *Lopez*, 115 S. Ct. at 1629. Although the court of appeals found the government's argument "plausible" in light of *Lopez* and earlier Supreme Court precedent, 95-1523 Pet. App. 28, it did not decide the question because it held that the Access Act is constitutional as a regulation that substantially affects interstate commerce. *Id.* at 31. For the same reason, the court of appeals did not reach the question whether Congress had power to

enact the Access Act under Section 5 of the Fourteenth Amendment. *Id.* at 8.

Judge Coffey dissented, stating that, in his view, Congress had no authority under the Commerce Clause to enact the Access Act. 95-1523 Pet. App. 32-65.

ARGUMENT

Petitioners contend that Congress lacked authority under the Commerce Clause to enact the Access Act. They argue that the Act is invalid under *United States* v. *Lopez*, 115 S. Ct. 1624 (1995), because the activity it prohibits does not substantially affect interstate commerce. Petitioners' arguments are substantially similar to arguments raised by petitioners in *American Life League, Inc.* v. *Reno*, No. 94-1867, which the Court declined to review. 116 S. Ct. 55 (1995). The Court should deny review in this case for the same reasons. The court of appeals correctly applied *Lopez*, and its holding does not conflict with the decisions of this Court or any other court of appeals.[2]

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[2] Petitioners concede that the other three courts of appeals that have considered the issue have reached the same conclusion as the Seventh Circuit in this case and have ruled that the Access Act is a valid exercise of Congress's Commerce Clause powers (95-1523 Pet. 7 & n.2; 95-1883 Pet. 5-6 & n.3; see also 95-8995 Pet. 5 n.1): *United States* v. *Dinwiddie*, 76 F.3d 913, 919-921 (8th Cir. 1996); *Cheffer* v. *Reno*, 55 F.3d 1517, 1519-1521 (11th Cir. 1995); *American Life League, Inc.* v. *Reno*, 47 F.3d 642, 647 (4th Cir.), cert. denied, 116 S. Ct. 55 (1995). The Seventh Circuit recently reaffirmed its ruling that Congress had authority under the Commerce Clause to enact the Access

The Court in *Lopez* reaffirmed Congress's power under the Commerce Clause to regulate three broad categories of conduct. 115 S. Ct. at 1629-1630. First, Congress is empowered to regulate the use of the channels of interstate commerce. *Id.* at 1629. Second, Congress is empowered to "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce." *Ibid.* Third, Congress is empowered to regulate or prohibit "activities that substantially affect interstate commerce." *Id.* at 1629-1630.

The court of appeals correctly held that the Act is a valid exercise of Congress's power to regulate "activities that substantially affect interstate com-

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Act. See *United States* v. *Soderna*, 82 F.3d 1370, 1373-1374, 1379 (7th Cir. 1996) (Posner, C.J.).

District courts in the Second, Fifth, Ninth and Tenth Circuits have reached the same conclusion. See *United States* v. *Scott*, 919 F. Supp. 76 (D. Conn. 1996); *United States* v. *Bird*, Crim. No. H-95-71 (S.D. Tex. June 6, 1995), appeal pending, No. 95-20792 (5th Cir.); *Cook* v. *Reno*, 859 F. Supp. 1008, 1011 & n.2 (W.D. La. 1994); *United States* v. *McMillan*, C.A. No. 3:95-cv-633WS (S.D. Miss. Nov. 24, 1995); *United States* v. *White*, 893 F. Supp. 1423 (C.D. Cal. 1995); *Riely* v. *Reno*, 860 F. Supp. 693, 707-708 (D. Ariz. 1994); *Council for Life Coalition* v. *Reno*, 856 F. Supp. 1422, 1430-1431 (S.D. Cal. 1994); *United States* v. *Lucero*, 895 F. Supp. 1421, 1423-1424 (D. Kan. 1995).

Apart from the district court decision in the instant case, we are aware of only one court that has held that Congress lacked authority under the Commerce Clause to enact the Access Act. See *Hoffman* v. *Hunt*, No. 3:93-CV-393 P, 1996 WL 192934 (W.D.N.C. Apr. 17, 1996), appeal pending, Nos. 96-1581 & 96-1582 (4th Cir.). That district court decision conflicts with binding precedent of its own circuit, see *American Life League*, *supra*, and does not create a conflict calling for this Court's review.

merce." *Lopez*, 115 S. Ct. at 1630.[3] Congress is empowered to regulate conduct that "substantially affects" interstate commerce when considered in the aggregate. *Wickard* v. *Filburn*, 317 U.S. 111, 127-128 (1942). "Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez* v. *United States*, 402 U.S. 146, 154 (1971) (emphasis omitted) (upholding federal law criminalizing loan sharking without regard to whether particular loan transaction affected interstate commerce); see also *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 329-330 (1991) (boycott against one opthamologist affects interstate commerce).

Congress had a rational basis for concluding that the violent and obstructive activity prohibited by the Access Act substantially affects interstate commerce by its adverse impact on clinics and other providers of reproductive health services that are involved in interstate commerce:

> Clinics and other abortion service providers clearly are involved in interstate commerce, both directly and indirectly. They purchase medicine, medical supplies, surgical instruments and other necessary medical products, often from other States; they employ staff; they own and lease

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[3] The United States maintains that the Act also may be sustained as a proper exercise of Congress's power, under the Commerce Clause, to regulate or protect "persons or things in interstate commerce," *Lopez*, 115 S. Ct. at 1629, and under Section 5 of the Fourteenth Amendment. Because the court of appeals did not reach these questions, they are not presented by the petition.

> office space; they generate income. In short, the Committee finds that they operate within the stream of interstate commerce.

S. Rep. 31. Also, many patients who seek abortion services "engage in interstate commerce by traveling from one state to obtain services in another," "[c]linic employees sometimes travel across State lines to work as well," and "some doctors who perform abortions work in facilities in more than one State." *Ibid.*

The violent and obstructive conduct proscribed by the Access Act substantially interferes with such interstate commerce. The proscribed conduct disrupts the sale of services and goods, the employment of personnel and generation of income, the purchase and lease of facilities and equipment, and the purchase of medicine and supplies from other States. H.R. Conf. Rep. 7; S. Rep. 14, 17, 31; H.R. Rep. 8-9. The legislative record of the Access Act specifies that

> the types of activities that would be prohibited by [the Act] have a negative effect on interstate commerce. As the record before the [Senate] Committee demonstrates, clinics have been closed because of blockades and sabotage and have been rendered unable to provide services. Abortion providers have been intimidated and frightened into ceasing to perform abortions. Clearly, the conduct prohibited by [the Act] results in the provision of fewer abortions and less interstate movement of people and goods.

S. Rep. 31. Activity prohibited by the Act forced some clinics to close, caused millions of dollars in damages to others, impeded the interstate movement of people and goods, contributed to a nationwide shortage of reproductive health services, *id.* at 3, 5, 17, 31; H.R.

Rep. 8, and threatened to eradicate those commercial services from the national market. S. Rep. 3. Extensive evidence that interference with abortion services is a problem of national scope further buttresses Congress's conclusion that the proscribed conduct has a substantial aggregate effect on interstate commerce. See, *e.g.*, *Katzenbach* v. *McClung*, 379 U.S. 294, 300-301 (1964) ("nationwide scope" of the problem of racial discrimination supported Congress's conclusion that it substantially affected interstate commerce).

Nothing in *Lopez* calls into question the court of appeals' holding. The Court in *Lopez* struck down the provision of the Gun Free School Zones Act that made criminal the possession of a firearm in the vicinity of a school. The Court reasoned that the statute "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 115 S. Ct. at 1630-1631; *id.* at 1640 (Kennedy, J., joined by O'Connor, J., concurring). The Court concluded that the possession of a firearm in a school zone does not substantially affect interstate commerce, *id.* at 1632, noting that possession of a gun in the vicinity of a school zone bore such an attenuated relationship to interstate commerce that the Court would be required to "pile inference upon inference" to conclude that the regulated conduct affects commerce, *id.* at 1634. The Court also noted the absence of evidence or congressional findings demonstrating that the regulated conduct substantially affects interstate commerce. *Id.* at 1631.

The Access Act differs markedly from the statute held unconstitutional in *Lopez*. First, the Access Act "by its terms" directly addresses "commerce" and

"economic enterprise[s]," *Lopez*, 115 S. Ct. at 1630-1631. The Act prohibits interference with commercial enterprises and with persons because they are engaging in commerce, *i.e.*, they are providing or obtaining the commercial service of reproductive health care. See 18 U.S.C. 248(a)(1) (prohibiting interference with "persons * * * obtaining or providing reproductive health services"); Section 248(e)(1), (4), and (5) (defining prohibited physical obstruction to mean rendering impassable ingress to or egress from a reproductive health services facility). Further, "the design of the statute ha[s] an evident commercial nexus," *Lopez*, 115 S. Ct. at 1640 (O'Connor, J., concurring). It ensures access to a particular commercial service and is designed to prevent elimination of that service from the national market. See Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, § 2, 108 Stat. 694, 18 U.S.C. 248; S. Rep. 3. Unlike in *Lopez*, where neither the prohibited conduct (possession of a gun near schools) nor its immediate effect (increased potential for violence in schools) was commercial, here, the immediate effect of the prohibited conduct is obstruction of commercial transactions.

Second, in contrast to *Lopez*, the effect of physical obstruction of reproductive health services facilities on interstate commerce is direct: It interferes with persons, things, and the provision of services in interstate commerce and threatens in the aggregate to eliminate abortion services from the national commerce. S. Rep. 3. No leap of "inference," *Lopez*, 115 S. Ct. at 1634, is required to find that the effect of the prohibited conduct is to stop the rendering of a service that Congress rationally found to be a part of interstate commerce.

Third, the Access Act, unlike the Gun-Free School Zones Act as originally adopted, is supported by a legislative record containing abundant evidence and specific findings by Congress showing that the proscribed conduct substantially impedes interstate commerce—findings to which the courts must defer. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981).[4]

Petitioners nonetheless argue that Congress lacked authority to enact the Access Act because the conduct prohibited by the statute is not a commercial transaction or "economic" in nature (95-1523 Pet. 8-11; 95-1883 Pet. 7-10; 95-9041 Pet. 7-9). Petitioners suggest that, therefore, the Act is invalid because it does not require proof that an individual defendant's conduct affected interstate commerce (95-1883 Pet. 8-10). The court of appeals properly rejected this argument, concluding that Congress's power includes the authority to prohibit conduct that is not itself an economic transaction, so long as the conduct is connected with commercial activity and has a substantial effect on interstate commerce. 95-1523 Pet.

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[4] Petitioners suggest that the legislative record is unworthy of consideration because Congress did not expressly invoke the word "substantially" in explaining how anti-abortion obstructive activity burdens interstate commerce (95-1883 Pet. 12-13; 95-8995 Pet. 11 n.2). Contrary to petitioners' suggestion, Congress's authority to legislate is not contingent upon a "formal finding[]" that the targeted conduct "substantially" affects interstate commerce. *Lopez*, 115 S. Ct. at 1631; accord *Preseault* v. *ICC*, 494 U.S. 1, 17 (1990). Regardless of whether Congress uses the term "substantially affects," Congress's underlying factual findings, which support its conclusion that its commerce power reaches particular conduct, are entitled to deference. See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 276-280.

App. 21-23. *Lopez* reaffirmed that Congress's commerce power extends to activities that *either* "arise out of *or* are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." 115 S. Ct. at 1631 (emphasis added). The conduct proscribed by the Act is undoubtedly "connected with a commercial transaction" because it interferes with persons who are providing or obtaining a particular commercial service (*i.e.*, reproductive health care). Thus, the Access Act is within the commerce power and need not require proof that a particular defendant's conduct affected interstate commerce. See *Lopez*, 115 S. Ct. at 1631.

Petitioners also suggest that the Access Act violates principles of federalism and the Tenth Amendment by criminalizing conduct that already violates state law (95-1523 Pet. 13-15; 95-8995 Pet. 7, 9-13; 95-1883 Pet. 6, 10-11, 15). The court of appeals correctly rejected that argument. 95-1523 Pet. App. 20-21. This Court has long recognized that, where Congress acts pursuant to its Commerce Clause powers, it may proscribe conduct even if States have traditionally exercised their police powers over such activity. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 291-292. *Lopez* did not overrule this long-standing precedent, but instead reaffirmed that Congress may criminalize conduct that substantially affects interstate commerce. 115 S. Ct. at 1629-1630.[5]

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[5] Petitioners incorrectly suggest that the court of appeals' decision conflicts with *United States* v. *Robertson*, 115 S. Ct. 1732 (1995) (see 95-1523 Pet. 10-11), and *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) (see 95-8995 Pet. 9-

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General
DEVAL L. PATRICK
Assistant Attorney General
JESSICA DUNSAY SILVER
GREGORY B. FRIEL
Attorneys

JUNE 1996

10; 95-9041 Pet. 8-9). *Robertson* referred to Congress's Commerce Clause powers briefly in dictum (115 S. Ct. at 1733) and expressly declined to decide whether certain activities "substantially affect[] interstate commerce" (*ibid.*). Nothing in the *Robertson* opinion suggests that Congress lacks power under the Commerce Clause to prohibit conduct that is not itself economic in nature. Congress clearly has the authority to regulate such conduct where, as here, it interferes with a commercial activity in a way that substantially affects interstate commerce.

Bray is also inapposite. In *Bray*, the Court held, *inter alia*, that anti-abortion activists had not interfered with the plaintiffs' constitutional rights to travel. 506 U.S. at 276-277. Commerce Clause jurisprudence and the constitutional right to travel interstate are doctrinally and conceptually unrelated, as the Court recognized in *Bray*. *Id.* at 277 n.7. Whereas the Court concluded that the "purely intrastate" activity of the abortion protestors in *Bray* did "not implicate the right of interstate travel" (*id.* at 277), the Court has repeatedly held that purely intrastate activity is a proper target of Congress's commerce power if, in the aggregate, such conduct affects interstate commerce. See, *e.g.*, *Fry* v. *United States*, 421 U.S. 542, 547 (1975).